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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No. 971 39

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals,
Eighth Circuit,

and

BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD.	No.....

PETITION FOR WRIT OF CERTIORARI

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Proceedings.

This case was commenced by the National Labor Relations Board (hereinafter called "Board"), which filed in the United States Circuit Court of Appeals, Eighth Circuit, pursuant to Section 10 (e) of the National Labor Relations Act, 29 USCA, Section 160 (e), its petition for

enforcement of an order entered by the Board on December 17, 1943 (Tr. pp. 1-[64-67])[1]. The said order directed your petitioner (hereinafter called the "Company") to cease and desist from refusing to bargain collectively with St. Louis Joint Council, United Retail and Department Store Employees of America, CIO (hereinafter called "Joint Council"), as exclusive representative of the Company's employees at its St. Louis store in two departments, called busheling rooms, engaged in altering men's clothing, and affirmatively ordered the Company to bargain collectively with the Joint Council as the representative of said employees. Said order, in paragraph 1 (b) thereof, also directed the Company to cease and desist from

> "(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act."

and said order provided for the posting of notices and reporting compliance to the Board by the Company (Tr. pp. 1-[53-54]).

Pursuant to Section 9 (d) of the National Labor Relations Act, the transcript filed by the Board in the Circuit Court of Appeals included the record of proceedings and the certification issued by the Board on a petition filed by the Joint Council for investigation and certification of representatives. In said proceedings the American Federation of Labor, which has conducted a rival campaign to

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1 In accordance with paragraph 7 of Rule 38 of this Court the record as printed below with the proceedings and opinion in that court have been filed here. Citations to pages of a printed volume in the record are shown by the number which appears on the volume followed by the numbers, in brackets, of the pages of the volume where the particular matter appears.

organize all the employees of the Company's store in a storewide unit, intervened and opposed the petition filed by the Joint Council (Tr. pp. 1-[7-9]).

The Company considered the said certification issued by the Board to be invalid and so notified the Joint Council. Thereafter the Board issued its complaint and alleged that the Company had engaged in unfair labor practices within the meaning of Section 8, subsections (1) and (5) of the National Labor Relations Act, in that it had refused to bargain with the Joint Council and also had taken steps unilaterally to obtain approval by the National War Labor Board of a wage increase for the employees within the said unit (Tr. pp. 1-[31-35]). The Company filed its answer to the complaint and admitted that it had refused to bargain with the Joint Council but denied the other allegations (Tr. p. 1-[38]). The Board thereafter issued its order mentioned above, and filed in the Circuit Court of Appeals its petition for enforcement of its said order. The Company answered the Board's petition and denied the validity of the certification and the order requiring the Company to bargain with the Joint Council and further denied the validity of paragraph 1 (b) of the order, which directed the Company to cease and desist from in any other manner engaging in any unfair labor practices prohibited by Section 8 (1) of the National Labor Relations Act and denied that it had engaged in any unfair labor practice within the meaning of said Act (Tr. pp. 1-[68-75]).

The United States Circuit Court of Appeals, Eighth Circuit, filed its opinion on December 20, 1944, in which it concluded as follows:

> "The order of the Board will be enforced" (Tr. p. 18).

The Company filed its petition for rehearing (Tr. pp. 19-32) on January 4, 1945, and thereafter, on January 11,

1945, said Circuit Court of Appeals entered an order denying the Company's petition for rehearing but modifying the order of the National Labor Relations Board so that paragraph 1 (b) of said order was made to read as follows:

> "(b) In any other manner interfering with, restraining, or coercing its employees **who are referred to in paragraph 1 (a)** in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act." (Emphasis supplied to show addition.)

and the Court ordered that the order of the Board as so modified will be enforced (Tr. p. 33). The employees referred to in paragraph 1 (a) of the Order are the employees in the said two departments known as busheling rooms (Tr. p. 34).

The Unit.

There are only 30 to 40 employees in these two departments (Tr. pp. 1-[4, 27]). The Company operates a department store in St. Louis, Missouri, in which it utilizes a main store building, three warehouses, and a customers' garage. Its functions are divided into more than 350 departments (Tr. p. 2-[165]). It has approximately 5,000 employees (Tr. p. 1-[4]). The 30 to 40 employees involved in this case make the alterations on men's and boys' clothing sold in the clothing departments of the store. Department 280 is on the second floor balcony and is under the management of the manager of the men's clothing department (Tr. pp. 2-[12-13]), and Department 281 is in the basement and is under the management of the manager of the basement men's clothing department (Tr. pp. 2-[40-42]).

There is a single personnel director for the entire store and there are identical regulations with reference to employment, transfer, promotion, salary increases, lay-offs, discharges, discipline, leaves of absence, vacations, admissions to the building, pay roll computations, sick leave pay, advances on salary, discounts, year-end bonuses, rules for the guidance of employees, group life insurance, group hospital insurance, welfare association membership, charge accounts, rest rooms, locker rooms, lunch rooms, hospital and library (Tr. p. 2-[77]).

No charge is made for alterations in the busheling departments (except for very infrequent occasions in special sales of men's clothing in the basement). The busheling departments are maintained for the purpose of fitting clothing sold in the men's and boys' clothing departments and for no other purpose (Tr. p. 2-[77]). Although the evidence showed that some degree of skill is required for work in the busheling rooms, this same skill is required for work in other alteration departments where women's clothing is altered and where fur garments are altered (Tr. pp. 2-[62-63]).

The Joint Council.

Although the Board stated in its Decision and Direction of Election that the Joint Council had membership, and presumably substantial membership, in the unit (Tr. p. 1-[11]), and the name of the Joint Council was the only name on the ballot (Tr. p. 1-[27]), the record shows that it had no membership in the unit and had not been designated by any employee (Tr. p. 2-[86]) but it had only an indefinite relationship (Tr. pp. 2-[37-38]) with a local union in which a number of the employees were members (Tr. p. 2-[86]).

The Application for Approval of a General Salary Increase.

On August 31, 1943, the Company filed with the National War Labor Board applications for approval of a general salary increase of $2 per week to practically all its employees (Bd. Ex. 9, Tr. pp. 2-[187-201]). One of these applications covered the employees of the Spring Avenue Warehouse and the other covered the employees of the store, the St. Charles Street Warehouse, and the Patrons' Garage (Tr. pp. 2-[187-188]). This latter application sought approval for the increase to all employees who were subject to the jurisdiction of the National War Labor Board, except the electricians, carpenters, painters and plasterers, who were craftsmen covered by collective bargaining contracts or working arrangements with their unions (Tr. pp. 2-[193-194]). No specific mention was made in the application of the employees in the busheling rooms, but in the letter by which the applications were transmitted to the War Labor Board (Tr. pp. 2-[187-188]), the Company stated all the facts relating to the certification of the Joint Council as representative of these employees and that the Company was contesting this certification, that it was the Company's intention that the employees in these departments should be included in the application, but, if the Joint Council should object to their inclusion, then they might be excluded.

Immediately after August 31, 1943, the Company announced to its employees that the applications had been filed. No specific mention was made of the employees in the busheling rooms (Bd. Exs. 10 and 11, Tr. pp. 2-[181-182, 201-203]). No action had been taken on the applications at the time of the hearing.

No Other Claimed Unfair Labor Practices.

The refusal of the Company to recognize the Joint Council, pending court review of the Board's decision, and the filing and announcement of the application for the general salary increase are the only acts claimed to have been unfair labor practices engaged in by the Company.

II.

JURISDICTION.

The basis upon which it is contended that this Court has jurisdiction to review the decree in question is as follows:

Section 240 of the Judicial Code, as amended, 28 USCA, Sec. 347, provides that in any case in a Circuit Court of Appeals it shall be competent for this Court, upon the petition of any party thereto, to require by certiorari that the cause be certified to this Court for determination here with the same power and authority, and with like effect, as if the cause had been brought here by unrestricted writ of error or appeal.

Section 10 (e) of the National Labor Relations Act, 29 USCA, Sec. 160 (e), provides that the Board shall have power to petition any Circuit Court of Appeals within any circuit wherein the respondent transacts business for the enforcement of its orders entered as provided in Section 10 of said Act and that the jurisdiction of the Circuit Court of Appeals shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by this Court upon writ of certiorari or certification.

The decree of the United States Circuit Court of Appeals, Eighth Circuit, sought to be reviewed here, was entered on the 11th day of January, 1945 (Tr. p. 33).

III.

THE QUESTIONS PRESENTED.

This case presents the following questions:

(a) Whether the order of the Board, as modified by the Court, and enforced by the Court, as so modified, directing the Company to cease and desist from

> "in any other manner interfering with, restraining, or coercing its employees who are referred to in paragraph 1 (a) in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act,"

is not too broad, where the Company is not claimed to have engaged in any unfair labor practices, except the refusal to bargain while the certification of the Board was being reviewed by the Court and the filing and announcement of the application to the National War Labor Board for approval of a $2 per week general salary increase for substantially all the Company's employees, more than 4500, in which application the Company was willing to have the 30 to 40 employees involved in the contested certification either included or excluded as desired by the Joint Council.

(b) Whether or not it was an unfair labor practice for the Company to file with the National War Labor Board an application for approval of the $2 per week general salary increase for substantially all its employees and to state all the facts to the War Labor Board and state that it was willing to include in the increase the 30 to 40 employees in the unit for which the Joint Council had been certified by the Board, which certification the Com-

pany had announced it would contest in the courts, or was willing to exclude those employees if the Joint Council objected, and to announce to the employees the filing of such application without any specific mention of the employees in the said certified unit.

(c) Whether or not the National Labor Relations Board may place the name of an organization on the ballot and, as a result of the election, certify that organization as exclusive bargaining agent for a unit where said organization has no membership among the employees involved and none have designated it as representative, but it has only some indefinite relationship with a local union in which a number of the said employees are members.

(d) Whether or not the National Labor Relations Board may determine a unit consisting of 30 to 40 employees in two separate departments out of more than 350 departments in a department store to be appropriate, where those employees have some degree of skill, but the skill is not different from that required for work in other similar departments and where rival unions are conducting store-wide organizing campaigns (Tr. p. 1-[7-9]) and the petitioning union claims to have substantial membership throughout the store (Tr. p. 2-[11]) and has publicly announced its intention to organize the entire store by a series of election petitions and has stated:

> "Where we will petition next depends upon only one thing. That is which group is ready next" (Tr. p. 2-[139]).

IV.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

A. The decision of the Circuit Court of Appeals, Eighth Circuit, is in conflict with the applicable decision of this Court in the case of **National Labor Relations Board v.**

Express Publishing Co., 312 U. S. 426, 85 L. Ed. 930, in that Section 1 (b) of the Board's order, as modified by the Circuit Court of Appeals, and enforced as so modified, is too broad and fails to state with reasonable specificity the acts which the Company is to refrain from doing, and it restrains the Company generally from other unlawful practices which it has neither found to have been pursued nor to be related to the proven conduct said to be unlawful. Said decision of the Circuit Court of Appeals enjoins other violations of the statute which bear no resemblance to that which the Company is claimed to have committed, and there is no finding or claim that danger of their commission in the future is to be anticipated from the course of the Company's conduct in the past.

B. The decision of the Circuit Court of Appeals, Eighth Circuit, is in conflict with the decisions of other Circuit Courts of Appeals on the same question in the cases of **National Labor Relations Board v. Mason Mfg. Co.** (CCA 9), 126 Fed. (2d) 810; **National Labor Relations Board v. Newark Morning Ledger Co.** (CCA 3), 120 Fed. (2d) 262; **Singer Mfg. Co. v. National Labor Relations Board** (CCA 7), 119 Fed. (2d) 131, and **National Labor Relations Board v. Swift & Co.** (CCA 7), 108 Fed. (2d) 988, in that Section 1 (b) of the Board's order, as modified by the Court, restraining generally all violations of Section 7 of the National Labor Relations Act, is too broad and is not limited to the disposition of the issues which were presented to the Board and to the Court and restrains acts not found to have been committed nor related to the acts found and as to which there is no basis for a claim of apprehension that they will be committed in the future.

C. The decision of the Circuit Court of Appeals is in conflict with the applicable decision of this Court in the case of **Medo Photo Supply Corp. v. National Labor Relations Board**, 321 U. S. 678, and in conflict with the decision

of another Court of Appeals on the same question in the case of **Peter J. Schweitzer, Inc., v. National Labor Relations Board** (App. D. C.), 144 Fed. (2d) 520, in that the opinion of the Circuit Court of Appeals, Eighth Circuit, holds that the application of the Company to the National War Labor Board for approval of a general salary increase to substantially all its employees was an unfair labor practice, although there was no suggestion that any employees should withdraw from the union in order to obtain the benefits of the increase.

D. The Circuit Court of Appeals, Eighth Circuit, has decided important questions of federal law which have not been, but should be, settled by this Court:

(1) One such question is whether the Board may place the name of an organization on the ballot and, as a result of the election, certify it as exclusive bargaining representative of employees, where said organization has no membership among the employees, and none have designated it as representative, but it has only some indefinite relationship to a local union which has a number of members in the unit; and

(2) Another such question is whether the Board may determine as appropriate a unit consisting of 30 to 40 employees in two out of three hundred and fifty departments in a department store where the employees in the two departments have some degree of skill, but not different from the skill employed in other departments doing the same kind of work and where two rival unions are conducting storewide organizing campaigns and the petitioning union claims to have substantial membership throughout the store and has announced publicly its intention to file a series of election petitions, and has stated:

> "Where we will petition next depends upon only one thing. That is which group is ready next."

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record, and of the proceedings of said Circuit Court of Appeals in the case numbered and entitled on its docket as No. 12,840, National Labor Relations Board, Petitioner, v. May Department Stores Company, doing business as Famous-Barr Company, Respondent, to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States, that the decree of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated February 19, 1945.

THE MAY DEPARTMENT STORES COMPANY,

By LYLE M. ALLEN,
R. WALSTON CHUBB,
Attorneys for Petitioner.

MILTON H. TUCKER,
ROBERT T. BURCH,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD.	}	No.....

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit appears at page 7 of the transcript, and the subsequent order of the said Court modifying the Board's order appears at page 33 of the transcript. The opinion is reported in 146 Fed. (2d) 66.

II.

JURISDICTION.

The Court's jurisdiction is invoked pursuant to the provisions of Section 240 of the Judicial Code, as amended, 28 USCA, Sec. 347; and Sec. 10-(e) of the National Labor

Relations Act, 29 USCA, Sec. 160 (e). The date of the decree entered by the Court below is January 11, 1945 (Tr. p. 33).

III.

STATEMENT OF THE CASE.

A statement of the case appears in the foregoing petition, which statement is hereby adopted and by reference made a part of this brief as the statement of the case.

IV.

SPECIFICATION OF ERRORS.

(1) The Court erred in ordering the enforcement of paragraph 1 (b) of the Board's Order, as modified by the Court, and in failing to order that said paragraph 1(b) of the Board's order be eliminated or, at least, modified so that it would be limited to the alleged unfair practice found by the Board.

(2) The Court erred in holding that the action of the Company in applying to the National War Labor Board for approval of a $2 per week general salary increase affecting the salaries of more than 4500 employees in its St. Louis store was an unfair labor practice, where the union did not claim to be the representative of the employees except the 30 to 40 employees in the two departments known as busheling rooms, and that claim was based upon a certification then being contested.

(3) The Court erred in holding that the action of the Company in applying to the National War Labor Board for approval of a general salary increase to substantially all its employees sustained the inference and conclusion of the Board that such action undermined the Joint Council among the 30 to 40 employees for whom it had been certified as bargaining representative, and discouraged

employees generally in their union affiliation, where there was no suggestion that any employees should withdraw from the union in order to obtain the benefits of the salary increase.

(4) The Court erred in holding that the Board could place the name of the Joint Council on the ballot and, as a result of the election, could certify it as representative of the employees, when none of the employees were members of the Joint Council or had designated it as representative, but it had some indefinite relationship with a local union in which a number of the employees were members.

(5) The Court erred in holding that the Board could determine as appropriate a unit composed of two departments, out of 350 departments in a department store, where the employees possessed some degree of skill, which, however, was not different from the skill required of employees in other departments doing the same kind of work and where rival unions were conducting storewide organizing campaigns and the petitioning union claimed substantial membership throughout the store and had announced that this was the first of a series of petitions and had publicly announced

"Where we will petition next depends upon only one thing. That is, which group is ready next."

V.

SUMMARY OF ARGUMENT.

A.

Paragraph 1 (b) of the Board's order, as modified by the Court and ordered enforced as so modified, is a blanket order restraining the Company generally from violating Section 7 of the National Labor Relations Act. This order is too broad. The decision of the Circuit Court of Appeals, Eighth Circuit, enforcing that portion of the order is in conflict with an applicable decision of this Court and is in conflict with decisions of other Circuit Courts of Appeals on the same question and is erroneous. Nothing in the record in this case justifies such a blanket order.

B.

The filing and announcement of the Company's application for approval by the National War Labor Board of the general salary increase for substantially all the Company's employees was not an unfair labor practice under the law. The decision by the Court below that such conduct by the Company was an unfair labor practice is in conflict with an applicable decision of this Court and is in conflict with the decision of another Court of Appeals on the same question and is erroneous.

C.

The certification of the Joint Council by the Board was invalid because the Board's finding that the Joint Council had substantial membership among the employees involved was not supported by any evidence, and the Board's action in placing the name of the Joint Council on the ballot was a representation to the employees that the Joint Council did have such membership, and the Board's action in

certifying the Joint Council and in ordering the Company to bargain with it was arbitrary, unreasonable and capricious.

D.

The Board's determination in this case of the unit as appropriate for the purposes of collective bargaining was arbitrary, unreasonable and capricious and cast an undue and unreasonable burden upon the Company.

VI.

ARGUMENT.

A.

Paragraph 1 (b) of the Board's Order, as Modified by the Court and Ordered Enforced as so Modified, Is a Blanket Order Restraining the Company Generally From Violating Section 7 of the National Labor Relations Act. This Order Is Too Broad. The Decision of the Circuit Court of Appeals, Eighth Circuit, Enforcing That Portion of the Order Is in Conflict With an Applicable Decision of This Court and Is in Conflict With Decisions of Other Circuit Courts of Appeals on the Same Question and Is Erroneous. Nothing in the Record in This Case Justifies Such a Blanket Order.

Paragraph 1 (b) of the Board's order, as modified by the Court and ordered enforced as so modified, is as follows:

> "(b) In any other manner interfering with, restraining, or coercing its employees **who are referred to in paragraph 1 (a)** in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed

in Section 7 of the National Labor Relations Act." (Emphasis supplied to show the words which were added by the Court to the Order as originally issued by the Board.)

Although the order as so modified by the Court is limited in its application to the employees in the two departments known as busheling rooms, it remains a blanket order to cease and desist from all violations of the Act with relation to those employees. As issued originally by the Board, it was a blanket order against the Company without any limitation. As modified by the Court, it is limited in its application to the employees of two departments, but remains a blanket order restraining all violations of the Act.

There is nothing in the record and nothing in the opinion of the Court below which under the law supports the broad language contained in the order, either as originally issued or as modified by the Court.

In the case of **National Labor Relations Board v. Express Publishing Co.**, 312 U. S. 426, 85 L. Ed. 930, the order sought to be enforced by the Board was for all practical purposes identical with the order in this case. This Court said:

> "It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.
>
> . . . . . .

"We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past."

The Board found, and the Court below sustained its finding, that the Company had engaged in an unfair labor practice in refusing to bargain with the Joint Council pending the decision of the Court below. Also the Board found, and the Court below sustained its finding, that the Company had engaged in an unfair labor practice in filing its application with the National War Labor Board for approval of the $2 per week general salary increase to more than 4500 employees in its St. Louis store and stating to the War Labor Board its intention to include the employees in the two departments for whom the Joint Council had been certified as bargaining agent, but that those employees might be excluded if the Joint Council objected to their being included.

If it be assumed that the Company's filing the application for approval of the salary increase was an unfair labor practice, it was no more than an additional refusal to bargain with the Joint Council pending judicial review of the certification. Certainly the acts taken by the Company to obtain approval of the salary increase for more than 4500 employees, only about 30 of whom were claimed to be represented by the Joint Council, would not be an unfair labor practice, except to the extent that it was evidence of the Company's refusal to bargain with the Joint Council whose certification was being contested. No contention was made, and none could be made, that the Com-

pany filed the application with the War Labor Board for the purpose of interfering with the union. The only contention was that the Company did not bargain with the union.

Of the five cases mentioned in the opinion of the Court below (Tr. p. 17) as holding that a voluntary wage increase without collective bargaining may be an unfair labor practice, if the employees are organized, the case of N. L. R. B. v. Christian Board of Publication, 113 Fed. (2d) 678 (C. C. A. 8), held that the wage increase under the circumstances of that case was evidence of the company's domination of an independent union. In the other four cases, Wilson & Co., Inc., v. N. L. R. B., 115 Fed. (2d) 759 (C. C. A. 8); Singer Mfg. Co. v. N. L. R. B., 119 Fed. (2d) 131 (C. C. A. 7); N. L. R. B. v. Barrett Co., 135 Fed. (2d) 959 (C. C. A. 7), and Great Southern Trucking Co. v. N. L. R. B., 127 Fed. (2d) 180 (C. C. A. 5), it was held that the wage increase involved in each case was evidence of the company's refusal to bargain.

Assuming, however, that two distinct unfair labor practices—(1) refusal to bargain and (2) failure to bargain for the storewide salary increase with a union which claimed to represent only 30 to 40 employees in two departments—have been found by the Board and sustained by the Court, there is still no justification for the broad language contained in paragraph 1 (b) of the order.

The record here shows only that the Company exercised the right given by Section 10 of the National Labor Relations Act to have the Court review the decision of the Board. That review could be obtained only by refusing to bargain.

In the case of **American Federation of Labor v. National Labor Relations Board**, 308 U. S. 401, 409, 84 L. Ed. 347, 352, this Court said:

> "Here it is evident that the entire structure of the Act emphasizes, for purposes of review, the distinc-

tion between an 'order' of the Board restraining an unfair labor practice and a certification in representation proceedings. The one authorized by § 10 may be reviewed by the court on petition of the Board for enforcement of the order, or of a person aggrieved, in conformity to the procedure laid down in § 10, which says nothing of certifications. The other, authorized by § 9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice. The exclusion of representation proceedings from the review secured by the provisions of § 10 (f) is emphasized by the clauses of § 9 (d), which provide for certification by the Board of a record of a representation proceeding only in the case when there is a petition for review of an order of the Board restraining an unfair labor practice. **The statute on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices**, a purpose and a construction which its legislative history confirms." (Emphasis supplied.)

Hence, with respect to the refusal to bargain, the Company's unfair labor practice was the only practice which it could follow to obtain a judicial review of the Board's order.

With respect to the other alleged unfair labor practice, the failure of the Company to bargain for a salary increase to all its employees with the Joint Council which had been certified as bargaining agent for approximately 30 people, the record shows that the Company submitted all the facts to the War Labor Board and expressed its willingness to have the 30 employees included or, if the union should object to their inclusion, to have them excluded. Here, also, there was shown no more than the Company's failure to accept the certification by the Board pending a judicial review of that certification under Section 10 of the National Labor Relations Act, for if the Company had recognized the Joint Council and bargained

with it, the propriety of the certification would have been a moot question and there would have been nothing for review by the Court.

Nothing in the Company's conduct would justify an order restraining other violations which bear no resemblance to the Company's refusal to recognize the Joint Council pending a court review of the certification and the Company's effort to obtain War Labor Board approval of a general salary increase for more than 4500 employees, only about 30 of whom were involved in the contested certification, where the Company showed a willingness to have them either included or excluded as the Joint Council might elect. Nothing in the Company's conduct gives evidence of any danger that the Company would commit any unfair labor practices in the future and the Board did not find that it was justified in anticipating any future violation of the Act from the course of the Company's conduct in the past.

It appears plain that the decision of the Court below is in conflict with the decision of this Court in the case of **National Labor Relations Board v. Express Publishing Co.**, supra.

Also, the decision of the Court below enforcing paragraph 1 (b) of the Board's order, as modified by the Court, is in conflict with decisions of other Circuit Courts of Appeals on the same question.

In the case of **National Labor Relations Board v. Mason** (CCA 9), 126 Fed. (2d) 810, the Court sustained the Board's finding that the respondent had engaged in unfair labor practices in discharging eleven employees in violation of Section 8 (3) of the Act, but it ordered the elimination of language similar to that contained in Paragraph 1 (b) of the Order under review here.

In the case of **National Labor Relations Board v. Newark Morning Ledger Company** (CCA 3), 120 Fed. (2d) 262, the Board found, and the Court sustained the finding,

that the respondent discharged the president of the local union because of her activity in behalf of the union. The Board ordered the reinstatement of the employee with back pay and the Board's order also contained language practically identical with the language of paragraph 1 (b) of the Board's order in this case. The Court enforced the portion of the Board's order which required reinstatement and back pay, but it ordered stricken out the blanket portion of the order restraining the respondent from committing any act in violation of the statute, and the Court said:

> "It is, however, now settled that in the absence of any finding that the unfair labor practices actually engaged in by an employer have been so persistent and varied as to justify the apprehension of continued similar and varied efforts in the future to interfere with the employees' right of self-organization and collective bargaining, the entry of a blanket order to cease and desist from all violations of the act is not justified. National Labor Relations Board v. Express Publishing Co., 61 S. Ct. 693."

In the case of **Singer Mfg. Co. v. National Labor Relations Board** (CCA 7), 119 Fed. 2d 131, the Court sustained the Board's finding that the company had refused to bargain with the union and also found that the company had given wage increases to the employees while refusing to bargain with the union. The facts in that case are not similar to the facts involved here, because there the company was not seeking a judicial review of the Board's order but was meeting with the union and not bargaining in good faith, as the Board found. However, the two alleged unfair labor practices of which complaint is made here, refusal to bargain and granting a unilateral wage increase, were present in the Singer Manufacturing Company case and there the Court ordered the elimination from the Board's order of language similar to the language contained in Paragraph 1 (b) of the order under review here. The Court said:

"Petitioner, complaining that that portion of the order which directs petitioner to cease and desist from interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act 'in any other manner' is beyond the Board's power, relies upon the language of this court in N. L. R. B. v. Swift & Co., 7 Cir., 108 Fed. (2d) 988, 990, wherein we said that the Board was not warranted in enjoining respondents in that cause from committing any act 'which might constitute a violation of Sec. 7 of the Act.'

"In the interest of certainty administrative orders and judicial judgments should be limited strictly to disposition of only such issues as are actually presented. The language of Mr. Justice Stone, in N. L. R. B. v. Express Publishing Company, 61 S. Ct. 693, 700, 85 L. Ed. . . ., decided March 3, 1941, as follows, is applicable: 'The National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here. To require it is no more onerous or embarrassing to the Board than to a court. * * * An appropriate order in the circumstances of the present case would go no further than to restrain respondent from any refusal to bargain and from any other acts in any manner interfering with the Guild's efforts to negotiate.'

"So here the order appropriately should go no further than restrain petitioner from refusing to bargain and from any other acts in any manner interfering with United's efforts to negotiate. The order will be modified as indicated and, as modified, enforced."

To the same effect is a decision of the Circuit Court of Appeals, Seventh Circuit, in the case of **National Labor Relations Board v. Swift & Co.**, 108 Fed. 2d 988.

It seems plain that the decision of the Court below in ordering the enforcement of paragraph 1 (b) of the order is in conflict with an applicable decision of this Court and with the decisions of other Circuit Courts of Appeals, as specifically pointed out above. The action of the Court below in modifying this portion of the Board's order did not correct the error. It limited the application of the erroneous portion of the order to those employees in the two departments known as busheling rooms, but it remains a blanket order restraining the Company from acts which the Company is not claimed to have committed. And there is no basis in the Company's past conduct to suggest that other violations of the Act should be anticipated. It is therefore respectfully submitted that paragraph 1 (b) of the Board's order, as modified by the Court, should be eliminated, or at least modified so that it will be limited to the alleged unfair labor practice found by the Board.

B.

The Filing and Announcement of the Company's Application for Approval by the National War Labor Board of the General Salary Increase for Substantially All the Company's Employees Was Not an Unfair Labor Practice Under the Law. The Decision by the Court Below that Such Conduct by the Company Was an Unfair Labor Practice Is in Conflict With an Applicable Decision of This Court and Is in Conflict With the Decision of Another Court of Appeals on the Same Question and Is Erroneous.

When the Company filed with the National War Labor Board on August 31, 1943, its application for approval of a $2 per week general salary increase for more than 4500

employees in its store and adjacent warehouse and also filed an application for approval of a similar general increase for its employees in its Spring Avenue Warehouse (Bd. Ex. 9, Tr. pp. 2-[187-201]), it was required to choose between including or excluding the 30 to 40 employees in the two departments for which the Board had certified the Joint Council as representative. The Company desired to obtain a court review of that certification and it was given the right to obtain such review by Section 10 of the National Labor Relations Act. In order to preserve that right and not render the question of the propriety of the certification a moot question, the Company could not bargain with the Joint Council for the 30 to 40 employees, but was required by the circumstances either to include them in the application with the 4500 employees of the store or to exclude them. In that situation the Company wrote a letter to the National War Labor Board (Tr. pp. 2-[187-188]) and filed it with the applications, and in the letter the Company advised the War Labor Board of all the circumstances, including the certification and the fact that the Company intended to contest the certification in Court and stated it was the Company's intention to include in the application the employees in the two departments, Nos. 280 and 281, but if the Joint Council objected they could be excluded (Tr. p. 2-[188]). The Company announced to its employees that the applications had been filed, but it made no specific mention of the employees in the busheling rooms.

The Board held that this action of the Company was an unfair labor practice, and the Court below sustained that holding (Tr. p. 16). The Court in its opinion has stated that the Act makes it the duty of the employer to bargain collectively with a certified union and that a voluntary wage increase without collective bargaining when the employees are organized may be found to be an unfair labor practice. As shown above, however, the authorities cited

by the Court hold only that the granting of a wage increase under the circumstances involved in those cases was in one case evidence of a Company-dominated union, and in the other four cases evidence of a refusal to bargain.

In the case of **Medo Photo Supply Corp. v. National Labor Relations Board,** 321 U. S. 678, this Court held that the granting of a voluntary wage increase, without collective bargaining when the employees were organized, was an unfair labor practice only because it was granted, in response to an offer of the employees, to induce them to leave the union. No suggestion of that kind appears in this case.

In the case of **Peter J. Schweitzer, Inc., v. National Labor Relations Board** (App. D. C.), 144 Fed. 2d 520, the majority of the Court said;

> "We cannot agree with the concurring opinion filed here that an increase in wages or an improvement in working conditions made during an election period is an unfair labor practice provided there is no suggestion that these benefits would be withdrawn if a union is organized. Such a principle would mean that it is the duty of an employer to refrain from benefiting his employees in order to make them more inclined to vote for a union."

The Company believes that under the law it was entitled to file its application with the National War Labor Board for approval of the general salary increase for substantially all its employees. The Company was then contesting the claim of the Joint Council to be the exclusive bargaining agent for the 30 to 40 employees of the bushelling rooms, and it recognized that the union might object to either the inclusion or the exclusion of those 30 to 40 employees in the said application. Therefore, the Company advised the National War Labor Board of all the facts and stated its willingness to have these few employees in Departments 280 and 281 either included or

excluded, as the Joint Council should elect. Thus, the Company made it possible for the employees in these two departments to obtain the benefit of the increase, but also made it possible for the Joint Council to exclude those employees from the application if the Joint Council felt that its interests would be best served (as apparently the Board felt they would be) by excluding them.

The decision of the Board and the opinion of the Court below appear to mean that there was nothing the Company might do to avoid engaging in an unfair labor practice except to refrain entirely from filing any application for approval of a salary increase for any or all its employees. We submit that such position is untenable and we do not believe that there is anything in the National Labor Relations Act which justifies the holding that an employer may not file an application with the National War Labor Board for approval of a general salary increase for over 4500 employees merely because a union has been certified as the representative of 30 to 40 employees, and the certification is then being contested in court, as provided by Section 10 of the National Labor Relations Act.

The entire subject of the application for approval by the National War Labor Board of the general salary increase shows absolutely no motive on the part of the Company except a legitimate business purpose, and the exercise by the Company of legal rights in furtherance of that business purpose. There is no evidence and no room for an inference that the Company intended to deprive the union of any credit or otherwise to injure it.

The Court below in its opinion referred to the fact that the union filed its charge with the Board on September 3, 1943, and that on September 11, 1943, the Company's vice president made an announcement to the employees in which he referred to the application then pending before the National War Labor Board, and said:

> "We sincerely hope that nothing will occur which will delay, or obstruct or prevent this approval."

The Court apparently drew an unfavorable inference from the chronology of these events (Tr. p. 16). But the Court overlooked the fact that the Company had no knowledge of the charge filed by the Joint Council at the time the Company's vice president on September 11, 1943, made his statement to the employees. Although the charge was filed with the Board on September 3, 1943 (Tr. p. 1-[29]), as stated in the opinion, the Company was not advised of it until September 23, 1943, when the Board issued its Complaint and Notice of Hearing (Tr. pp. 1-[35-36]).

None of the announcements made by the Company relating to the storewide salary increase contained any reference to the employees in Departments 280 and 281. In the Transcript pp. 2-(181-182) it is shown that the Board's Trial Attorney offered in evidence only those portions of the announcement of September 11 which were quoted in the opinion. The Board's Trial Attorney omitted to read into the record the remainder of that announcement which would have explained the reason for the language used. Then in the Court below for the first time it was inferred that the reference was to the charge filed by the union. The remainder of the announcement, which the Board could have introduced, would have shown to what the quoted language referred, but the Board chose not to offer the entire announcement. In any event, the record in this case shows that notice of the filing of the charge was not given to the Company until September 23, long after the announcement of September 11.

The Joint Council did not represent the 4500 other employees of the Company's store who were entitled to receive this storewide salary increase. There certainly would have been a claim of discrimination if the Company had applied for approval of the increase for all the employees except the employees in Departments 280 and 281. Therefore, the Company placed the entire situation, with all the facts, before the National War Labor Board and

stated its willingness to have the employees of Departments 280 and 281, either included or excluded. Certainly that position should not furnish any basis for a charge of bad faith.

The Board claims that the Company did not act in good faith because it did not bargain with the union for Departments 280 and 281 before filing the application for the storewide salary increase, but Section 10 of the National Labor Relations Act gives to the employer the right to obtain judicial review of the Board's orders. It is said that the certification was valid when issued and although subject to review, it could not be disregarded pending a review. **The difficulty with this position is that the certification cannot be reviewed in any other way than by refusing to comply with it. (American Federation of Labor v. National Labor Relations Board, 308 U. S. 401, 409, 84 L. Ed. 347, 352.)**

It is respectfully submitted that the construction placed by the Court below upon the National Labor Relations Act is contrary to the intent of Congress as shown by that Act and is in conflict with the applicable decision of this Court in the case of **Medo Photo Supply Corp. v. National Labor Relations Board,** 321 U. S. 678, and is in conflict with the decision of the Court of Appeals for the District of Columbia in the case of **Peter J. Schweitzer, Inc., v. National Labor Relations Board,** supra.

C.

The Certification of the Joint Council by the Board Was Invalid Because the Board's Finding That the Joint Council Had Substantial Membership Among the Employees Involved Was Not Supported by Any Evidence, and the Board's Action in Placing the Name of the Joint Council on the Ballot Was a Representation to the Employees That the Joint Council Did Have Such Membership, and the Board's Action in Certifying the Joint Council and in Ordering the Company to Bargain With It Was Arbitrary, Unreasonable and Capricious.

Section 9 (c) of the National Labor Relations Act provides that the Board shall provide for an appropriate hearing whenever a question affecting commerce arises concerning the representation of employees. Pursuant to this section the Board by long-established practice has required a showing, satisfactory to it, that the petitioning union represents a substantial number of the employees in the unit found to be appropriate.

In the Matter of Houston Shipbuilding Corporation, 41 N. L. R. B. 638, l. c. 641;
In the Matter of American Manufacturing Company, 41 N. L. R. B. 995;
In the Matter of Smith & Caffrey Co., 38 N. L. R. B. 90, l. c. 92.

Recognizing that procedure, the petitioning union here, Joint Council, alleged in its petition for certification that substantially more than 51 per cent of the employees in the unit had designated the petitioner as their representative for collective bargaining (Tr. p. 1-[4]). In the Decision and Direction of Election issued by the Board on June 16, 1943, the Board said that the petitioning union, St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, CIO, would in said Decision

and Direction of Election be thereafter referred to as the "CIO" (Tr. p. 1-[9]). The Board then found that a statement of its Regional Director, introduced into evidence at the hearing, **"indicates the membership of the CIO"** in the unit thereinafter found appropriate (Tr. p. 1-[11]). The only portion of the record upon which the Board could base its said finding was the statement of the Regional Director which showed no membership in the Joint Council, but rather membership in "The United Department Store Employees Union" (Tr. p. 2-[86]).

Although the witness Verderber testified that he did not know why the petition for certification in this case was filed by the Joint Council, it appears to be fairly obvious that it was done in an effort to avoid the effect of the decision by the Board entered on December 24, 1942, in the case No. R-4580, 46 N. L. R. B. 36, dismissing the petition filed by Department Store Employees Union, Local 372, for certification in a storewide unit of employees at the Company's store, in which petition the petitioning union represented that it had been designated as the representative of more than 51 per cent of all the employees in such storewide unit (Tr. p. 2-[159-167]).

Whether or not that was the reason for the filing of the petition in this case by the Joint Council, the record shows that not one employee of the Company belonged to the Joint Council, and not one employee of the Company had designated the Joint Council as the employees' bargaining agent. The finding by the Board that presumably a substantial number of the employees in the unit found by the Board to be appropriate were members of the Joint Council was not supported by any evidence and was directly contrary to the facts shown by the record. It is true that the Joint Council won the election held by the Board, but it is also true that the name of the Joint Council was the only name on the ballot (Tr. p. 1-[27]) and was placed there by the Board with a completely unwarranted finding

that it had a substantial number of members in the unit. In the matter of **Corn Products Refining Co.**, 58 N. L. R. B., No. 263, the Board said:

> "The literature in question does not purport to be a statement by a Board representative, **and the fact that the name of the Association appeared on the official ballot and the Regional Director's announcements of the election constituted positive proof, brought home to every voter, that this Board does recognize the Association as a legitimate labor organization,** contrary to the CIO's claim." (Emphasis supplied.)

How can the Board justify its certification of the Joint Council as the representative of all the employees in the unit based upon the result of an election which the Board held under an order which incorrectly represented to the voting employees that a substantial number of those employees were members of the Joint Council, which was the only name placed on the ballot by the Board? This was not mere inadvertence on the part of the Board. The Company called to the Board's attention the error which it had made. The Respondent's Motion for Reconsideration of the Decision and Direction of Election (Tr. p. 1-[17-20]) was filed and was considered by the Board and ruled upon before the election was held (Tr. p. 1-[25-26, 28]).

In view of the claim of special knowledge and understanding of representation cases claimed by the Board and recognized by the courts; in view of the Board's obligation to be impartial; in view of the non-reviewability of the Board's findings of facts and even its inferences therefrom (if supported by "substantial" evidence); in view of the recent decision of the Circuit Court of Appeals, Fourth Circuit, in the case of Madden v. Brotherhood and Union of Transit Employees, 15 L. R. R. 806, holding that there can be no court review of the Board's finding of company domination, if the finding is made in a repre-

sentation case; and in view of the finality of the decision of the Board as to appropriateness of any unit unless it is arbitrary and capricious, it would at least seem to be required of the Board that it refrain from holding out to the employees that a substantial number of their fellow employees were members of the Joint Council, when, in fact, as the Board well knew, not one of the employees was a member of the Joint Council. It is no answer to say that the Joint Council won the election by a very high percentage. The question is whether it can safely be said that this arbitrary and wholly unwarranted action by the Board did not influence the result of the election. Is it too much to ask that the Board refrain from consciously influencing the result of an election? Is it necessary further for the Company to show the number of votes so influenced?

If the Board had held that it was justified in placing the name of the Joint Council on the ballot because of the record showing that a number of employees in the unit had signed cards authorizing the United Department Store Employees' Union to represent them and the testimony of the organizer Boggs that the Joint Council is an organization composed of all the local unions and plants organized by the United Retail, Wholesale and Department Store Employees Union in the St. Louis Area, then we might challenge the correctness of the Board's opinion, but at least the employees would have had the benefit of a full disclosure of the facts by the Board. The Board chose, however, to hold the election on its order which contained the incorrect finding that the Joint Council had membership, and presumably substantial membership, among the employees. We submit that this action of the Board, taken consciously by the Board, destroys any presumption of validity which might otherwise attach to the Board's certification issued pursuant to Section 9 of the National Labor Relations Act, and was arbitrary, unreasonable and capricious, and that the Company was not

obligated to accept the said certification issued by the Board with such disregard for the true facts shown by the record.

D.

The Board's Determination in This Case of the Unit as Appropriate for the Purposes of Collective Bargaining Was Arbitrary, Unreasonable and Capricious and Cast an Undue and Unreasonable Burden Upon the Company.

Section 9 (b) of the National Labor Relations Act, 29 U. S. C. A., Sec. 159, authorizes the Board to decide in each case whether the unit shall be the employer unit, craft unit, plant unit or subdivision thereof. This authority of the Board, however, is subject to the limitation that such designation of the unit by the Board shall not be arbitrary, unreasonable or capricious.

Pittsburgh Plate Glass Co. v. National Labor Relations Board (CCA 8), 113 Fed. 2d 698, aff'd 313 U. S. 146, 85 L. Ed. 1251;
National Labor Relations Board v. Delaware-New Jersey F. Co. (CCA 3), 128 Fed. 2d 130, 137;
National Labor Relations Board v. Clarksburg Pub. Co. (CCA 4), 120 Fed. 2d 976, 980;
Bussmann Mfg. Co. v. National Labor Relations Board (CCA 8), 111 Fed. 2d 783, 785;
National Labor Relations Board v. Lund (CCA 8), 103 Fed. 2d 815, 819.

The record here shows that it was not the purpose of the Joint Council to represent the tailors as a separate unit for the benefit of the tailors. The petition filed with the Board for the bushelmen's unit was merely a part of one of the two rival storewide campaigns. It sought to have an election in a storewide unit in the fall of 1942, and its petition, filed on November 6, 1942, included the bushel-

men in the storewide unit (Tr. pp. 2-[159-161]). After that petition was denied the C. I. O. said, with reference to the petition in this case:

> "This is the first of a series of election petitions for various groups of employees. Others will follow shortly. * * * Our plan is to organize these groups as nearly 100% as possible just as we did the tailors. Then we will petition the Board for elections as rapidly as they are ready. * * * Remember. This new plan in no way conflicts with our final goal of a 100% Union store. We believe this new approach may do the job faster. * * * Your department alone may compose a bargaining unit. * * * By this new plan of action we are not dividing the employees into different local unions. Local 372 will remain the one Union in the store" (Int. Ex. 11, Tr. p. 2-[133]).

A few days later it said:

> "We will also discuss filing more election petitions. Perhaps your department will be included in this discussion. * * * We want to proceed at Famous-Barr unit by unit, until the time comes when we can petition for the entire store. Where we will petition next depends upon only one thing. That is which group is ready next" (Int. Ex. 12, Tr. pp. 2-[137-139]).

The witness Verderber, who is a member of the Master Committee of Local 372 (Tr. p. 2-[11]), testified, and the union claimed, that it has substantial membership throughout the store (Tr. p. 2-[11]). Verderber testified that the efforts to organize the store as a whole were continuing (Tr. p. 2-[30]). He testified that he considered a storewide unit the most desirable unit for the employees of the Company (Tr. p. 2-[30]).

The rights of the employees to organize and to bargain collectively are guaranteed by the National Labor Relations Act, but there is no law which requires an employer

to submit to a continuous series of campaigns, elections and bargaining conferences, because one of two competing unions believes it will thereby gain an advantage in reaching the ultimate goal of both unions to organize all the employees in one storewide unit. The intention of the CIO to carry on its campaign unit by unit is evident from its published statements quoted above. And the Board, by departing from its established policy and finding appropriate the unit claimed in this case, has indicated that the Company may not look to it for protection of the Company's right to operate its store without the long series of interruptions planned and announced by the CIO.

In its Decision and Direction of Election the Board made the following finding:

> "The Company contends further that the unit now sought is inappropriate in that it fails to include employees in the women's alteration department whose skills are similar to the skills of the employees in the unit sought by the CIO. While we agree that the record indicates a high degree of similarity in the work done in the alteration of women's clothing and in the work done in the busheling rooms, the departments are in different sections of the store; there is historically a sharp demarcation between the trades involved; and it does not appear that there is a substantial interchange of personnel between the women's and men's departments. Traditionally, such workers have been represented by separate craft unions" (Tr. p. 1-[13]).

In the first sentence of this finding the Board incorrectly stated the Company's position, which was that the fur alteration department, as well as the women's alteration department, employed skills comparable to those in the men's busheling rooms (Tr. pp. 2-[76, 78]).

In the remainder of the above quotation from the Decision and Direction of Election, the Board set forth rea-

sons for placing two groups of tailors employed by the Company in a unit separate from the other tailors employed by the Company. The first of these reasons was that the departments are in different sections of the store. This is specious, because each of the two busheling rooms is also in a different section of the store. Department 280 is on the second floor balcony of the store (Tr. p. 2-[3]) and Department 281 is in the basement (Tr. p. 2-[5]); the women's alteration department is on the eleventh floor (Tr. p. 2-[3]). The next reason given for distinguishing the women's alteration employees from the employees of the busheling rooms is: "There is historically a sharp demarcation between the trades involved." There was no evidence to support this statement of the Board. The union's witness Verderber, an employee in one of the busheling rooms, had worked on women's coats without difficulty (Tr. p. 2-[30]). The union's witness Scherer, business agent of the Amalgamated Clothing Workers, testified that in the only store under contract with his union, which handles both men's and women's clothing, the same employees alter both men's and women's clothing (Tr. p. 2-[36]). The witness Weber, manager of the basement busheling room, Department 281, had previously conducted his own tailoring business and made and altered both men's and women's clothing (Tr. p. 2-[40]). And the witness Swartz, who is superintendent of work rooms at Scruggs-Vandervoort-Barney, another department store in St. Louis, Missouri, has charge of all work rooms in that store and constantly transfers employees back and forth; he testified:

> "Q. In your opinion, would a qualified tailor be able to do the work in a busheling room or in the women's alteration department just as well? A. I use them for both.
>
> Q. Is that the setup at Scruggs? A. Yes, sir.

Q. You switch them back and forth as needed? A. Yes, sir.

* * * * * * *

Q. Does that also apply to the fur alteration room? A. Yes. I transfer people from that alteration room to the fur work room.

Q. And from the fur work room to the men's or women's alteration rooms? A. That is right.

* * * * * * *

Q. Is the act of skill required to do one of these classes of work in one of the work rooms mentioned as great as it is in one of the other work rooms? A. You mean one kind of skill?

Q. Yes, for the operator to go into one of the other rooms? A. I would say that is identical" (Tr. pp. 2-[61-63]).

There was no evidence to the contrary and no evidence to support the Board's conclusion that historically there is a demarcation between the trades.

The next reason given for making a distinction between the two groups of tailors in the busheling rooms and the other tailors is: "And it does not appear that there is a substantial interchange of personnel between the women's and men's departments." Verderber testified concerning transfers out of Department 280 to other parts of the store, including the fur work room (Tr. pp. 2-[6-10]). And the witness McCarthy testified that there were cases of interchange of employees between the men's busheling room and the women's alteration department, and vice versa (Tr. pp. 2-[76, 80-81]).

The last reason given for making a distinction between the employees of the two busheling rooms and the employees of the women's alteration department is: "Traditionally such workers have been represented by separate craft unions." The witness Scherer, business agent for the Amalgamated Clothing Workers, testified:

"Well, so far as the International Ladies' Garment Workers Union, it is an organization that caters more to the ladies' industry, such as dresses, underwear and so on. Our organization is more or less the men's clothing" (Tr. p. 2-[34]).

Doubtless that is true in the manufacturing industries, but the evidence in this case showed that in alteration departments it is not so. The Amalgamated Clothing Workers represents tailors working on both men's and women's clothing in the only store it has under contract which sells both (Tr. p. 2-[36]), and Local 372, United Retail, Wholesale and Department Store Employees, CIO, solicited not only the employees in the busheling rooms involved in this case, but also the employees in the women's alteration department (Int. Ex. 15, Tr. p. 2-[153]; Int. Ex. 12, Tr. p. 2-[139]), and it included all such employees in its petition for a storewide unit filed November 6, 1942 (Int. Ex. 17, Tr. pp. 2-[159-161]). In the case of **J. L. Brandeis & Son and Local No. 285 of the Amalgamated Clothing Workers of America, CIO, 47 N. L. R. B. 614**, the Amalgamated Clothing Workers petitioned for, and the Board ordered, an election in a unit composed of the employees engaged in the alteration of men's, women's and boys' clothing. In the case of **The May Department Stores Co., d/b/a The May Company, and Retail Clerks' International Protective Association and Retail Textile Clerks, A. F. of L., 39 N. L. R. B. 471, 1. c. 478**, which involved the Denver store of the Company, the Board said:

"The Textile Clerks request that seamstresses and furriers be included in its unit, but that tailors be excluded. The Company would include all three classifications of employees. Seamstresses perform alterations on ladies' clothing and millinery. Furriers alter and repair furs and are in charge of fur storage. Tailors are engaged in performing alterations on men's clothing. It is thus apparent that the duties of these

employees are similar. The Textile Clerks would exclude the tailors for the reason that they are under the jurisdiction of another organization affiliated with the American Federation of Labor and that several, in fact, are members of that organization. However, the seamstresses and furriers are also eligible to membership in other labor organizations connected with the American Federation of Labor. We shall exclude the seamstresses, furriers and tailors from the Textile Clerks' unit."

Thus we see that the stated reasons of the Board for holding that two groups of tailors out of several groups in the store constitute an appropriate unit are not supported by the evidence, but are, in fact, contrary to the evidence shown by the record, and are evidence of capriciousness, particularly since entirely opposite results were reached in the other cases cited.

The union in this case has no history of bargaining for tailors as a separate unit. At the trial of the representation case it was so stipulated (Tr. p. 2-[70-71]).

This is not a case where the Board's decision is based upon its interpretation of facts in evidence, but is a case where there is no evidence to sustain any of the reasons given by the Board for establishing the claimed unit. The Board's action is contrary to its expressed standards for determining an appropriate unit, is contrary to its practice in similar department store cases and is contrary to its "extent of organization theory," and consequently its action can only be considered as unreasonable and arbitrary.

It appears from the record that the unit composed of the employees in Departments 280 and 281 was not claimed by the union for the purpose of insuring to those employees their right to collective bargaining, but rather to assist the union in its campaign to organize the entire store, unit by unit, and to file a series of election petitions. In

view of the fact that the record shows the Company has over 350 departments in the store and there are two competing labor organizations undertaking to organize the employes of the store, the Company submits that the Board's action was unreasonable, arbitrary and capricious. The disturbances to the store's operations and the ill feeling engendered by the campaigns in a long series of elections, each for the employees of one or two departments, would cause an undue and unreasonable burden upon the Company. We submit that the Board's action in establishing this unit and directing an election therein and in ordering the Company to bargain with the union as a result of that election was unlawful and void, and we submit that said order should not be enforced.

CONCLUSION.

It is respectfully submitted that this case should be reviewed by this Court. The decision of the Court below is in conflict with applicable decisions of this Court and is in conflict with decisions of other Circuit Courts of Appeals, and the Court below has decided important questions of federal law which have not been, but should be, settled by this Court.

Respectfully submitted,

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